

STATE OF MICHIGAN
COURT OF APPEALS

VERNON THOMAS,

Plaintiff-Appellant,

v

VICTORIA GENERAL INSURANCE
COMPANY and TITAN INDEMNITY
COMPANY,

Defendants-Appellees.

UNPUBLISHED

July 21, 2011

No. 298243

Genesee Circuit Court

LC No. 09-091492-NF

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS AND PROCEDURAL HISTORY

In April 2008, plaintiff and his mother, Bettye Thomas, went to L.A. Insurance Agency to obtain an automobile insurance policy. The first page of the insurance application named Bettye as the applicant and named plaintiff as "driver number two." The application contained a section requiring disclosure of driving records, on which neither Bettye nor plaintiff reported any driving violations. In the applicant questionnaire section, Bettye initialed the statement "I attest that the vehicle(s) listed are titled in the name of the applicant. If any vehicle(s) are not titled in the name of the applicant, explain below." The listed vehicles included a 1997 Buick Park Avenue. Bettye signed the application, and, at the request of the insurance agent, plaintiff also signed the application.

Shortly after plaintiff and Bettye signed the application, defendant Victoria General advised L.A. Insurance Agency that the policy was being cancelled on the ground that plaintiff's driver's license was invalid. The following month, plaintiff reinstated his license and presented proof of the reinstatement to the insurance agency. Defendant Victoria General subsequently accepted payments on the policy.

In June 2008, plaintiff was in a collision while driving the Park Avenue. He subsequently filed this action seeking first-party coverage. Defendants moved for summary disposition, arguing that misrepresentations in the application rendered the policy void. The

alleged misrepresentations included: the failure to report that plaintiff's license was invalid, and the failure to disclose that the owner of the Park Avenue was plaintiff.

The trial court determined that plaintiff and Bettye made numerous misrepresentations on the application. The court concluded that, in accordance with the policy provisions, defendants were entitled to rescind the policy.

II. ANALYSIS

A trial court may grant summary disposition under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

"Where a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio*." *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997). As noted by plaintiff, a representation on an insurance application is material if "reasonably careful and intelligent underwriters would have regarded the fact or matter, communicated at the time of effecting the insurance, as substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Auto-Owners Ins Co v Comm'r of Ins*, 141 Mich App 776, 781; 369 NW2d 896 (1985), quoting *Keys v Pace*, 358 Mich 74, 82; 99 NW2d 547 (1959) (emphasis omitted).

Having reviewed the evidence presented in the summary disposition materials, we conclude that the application contained a material misrepresentation concerning the ownership of the Park Avenue. The application itself notified the applicant that ownership of the covered vehicles was material to the policy, as follows:

I understand that if I have purchased non-owner coverage, **NO** coverage will apply to anyone other than myself or to vehicles owned by me, my spouse or any other member of my household or any vehicles available for my regular or frequent use. I further agree that the provision on the Named Non-Owner Endorsement in the policy will apply.

Bettye attested in the application that the listed vehicles were titled in her name. However, it is undisputed that the title owner of the Park Avenue was plaintiff, not Bettye. Accordingly, the record demonstrates that there was no genuine issue of material fact with regard to the misrepresentation, and that defendants were entitled to judgment as a matter of law.

Plaintiff contends that the representation concerning ownership of the Park Avenue was accurate because he signed the application as an applicant. The application belies plaintiff's contention. First, the front page of the application identifies Bettye as the "Applicant." Second, the applicant questionnaire, which directs that "Applicant must complete and initial each response," contains only Bettye's initials. Third, the applicant acknowledgement line in the collision options section contains Bettye's initials only. Thus, the attestation that "the vehicle(s)

listed are titled in the name of the applicant” indicated that Bettye was the owner of the listed vehicles, including the Park Avenue.

An insurer may waive the right to rescission by its actions following its discovery of a material misrepresentation in the application for insurance. See generally *Burton v Wolverine Mut Ins Co*, 213 Mich App 514; 540 NW2d 480 (1995). A waiver is a voluntary relinquishment of a known right. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008). Similarly, an insured may estop an insurance company from enforcing a clause in a policy if the insured establishes that (1) the insurer’s acts or representations induced the insured to believe that the clause would not be enforced; (2) the insured justifiably relied on this belief; and (3) the insured was prejudiced as a result of the reliance on the belief that the clause would not be enforced. *Id.* at 204-205.

Here, plaintiff presented nothing to indicate that defendants were aware that plaintiff, not Bettye, was the title owner of the Park Avenue. Plaintiff did present evidence to indicate that defendants were aware that he lacked a valid driver’s license. That evidence, however, is not pertinent to the misrepresentation regarding ownership of the Park Avenue. Absent some proof that defendants knew of the actual ownership of the car, or that defendants induced plaintiff to believe that the ownership provisions were immaterial, there is no evidence from which the trial court could have found an issue concerning waiver or estoppel. Given the lack of pertinent evidence to suggest waiver or estoppel with regard to the ownership issue, the trial court properly declined to address waiver and estoppel.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O’Connell
/s/ Deborah A. Servitto